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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/767,685	01/24/2001	Wilhelm A. Keller	068754/0274	4423

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FOLEY AND LARDNER  
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EXAMINER
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BOMBERG, KENNETH

ART UNIT	PAPER NUMBER
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3754

DATE MAILED: 05/29/2003

24

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/767,685

Applicant(s)

KELLER ET AL.

Examiner

Kenneth Bomberg

Art Unit

3754

-- Th MAILING DATE of this communication app ars on the cover sheet with th correspondenc address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 24 April 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 8-27 is/are pending in the application.
- 4a) Of the above claim(s) 11 and 15 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-10, 12-14 and 16-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☒ Certified copies of the priority documents have been received in Application No. 08/563,109.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Continued Examination Under 37 CFR 1.114*

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 24, 2003 has been entered.

### *Claim Rejections - 35 USC § 103*

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 8-10, 12-14, and 16-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over KELLER (5,137,182) in view of Simmen (5,413,253).

In Fig. 7, column 3, lines 11-16, and column 4, lines 57-68, KELLER teaches of a cartridge (10) for a mixer having a bayonet coupling (7) and a closure member (20b). KELLER explicitly teaches "the cylinders 2, the dispensing canals 4, and the cross-sections of the matching stoppers 14 may be identical or different". Clearly if the cross-sections of the dispensing canals (4), and the cross-sections of the matching stoppers (14) of the cartridge are

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different as explicitly taught, the coding elements for coded introduction being dissimilarly sized, shaped, and visually different inherently follow.

KELLER '182 teaches of a device substantially according to the claims but does not explicitly teach of an associated mixer for mating with the cartridge. Dual cartridge containers as disclosed by KELLER '182 are customarily associated with related mixers as claimed in order to mix and dispense the material therein. Simmen teaches of such a mixer to mix and dispense material from a multiple cylinder cartridge. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included an associated mixer with the cartridge of KELLER in order to mix and dispense the material therein as is customary in the art and as taught by Simmen. Clearly such a mixer would be configured to mate with the bayonet and outlets of the cartridge.

Keller '182 does not explicitly teach the chambers each having a cylindrical-shaped outlet but instead states "the cylinders 2, dispensing canals 4, and the cross-sections of the matching stoppers 14 may be identical or different" (column 3, lines 14-15). It is clear from Keller '182, the outlet shape is not limited to that depicted in the figures. In figure 8, and column 6, lines 30-34, Simmen explicitly teaches of the chambers (102, 104) of a dispensing cartridge (100) each having a cylindrical-shaped outlet (108, 110). Cylindrical shaped outlets as taught by Simmen are well known and are often used because a cylindrical shape is well known to promote a smooth fluid flow and are strong. It would have been obvious to one of ordinary skill in the art at the time of the invention to have selected cylindrical shaped outlets for the chambers of Keller '182 as taught by Simmen because a cylindrical shape would promote a smooth fluid flow and are strong.

***Response to Arguments***

4. Applicant's arguments filed 19 November 2001, 09 August 2002, and 24 February 2003 have been fully considered but they are not persuasive.

Applicant's supplemental terminal disclaimer discussed in the remarks has been received. The terminal disclaimer overcomes the obvious-type double patenting rejection.

Applicant's argue that Keller '182 fails to provide an explicit teaching of alignment for the purpose of coding as disclosed in the present application. This argument is not persuasive because the claims recite structure that reads on the Keller '182 reference. Specifically, the claims call for "said coding elements comprising outlets of a different configuration relative to each other and said inlets being configured to conform thereto", "each said plug being configured to align with and connect to each said outlet of said plurality of chambers in only one orientation", and "each plug being configured to align with and connect to each outlet in only one orientation". The coding is subsequently claimed as being dissimilarly sized outlets, dissimilarly shaped outlets, or visual alignment means. Keller '182 discloses different cross section outlets. Outlets with different cross sections inherently are dissimilarly sized outlets, dissimilarly shaped outlets, and form visual alignment means. It is correct that the different cross section outlets are provided for an explicit reason of proportioning the two components, however, the outlets as disclosed meet the claim limitations as to structure. Inherently the intended use of coding would follow as two different cross section outlets could only be aligned in one direction. Applicants claim is directed to a structure that is capable of performing a function, given that the Keller '182 reference teaches the same structure that must inherently

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perform the same function, the argument of the lack of an explicit teaching with respect to the specific function is moot. *In re Swinehart and Sfiligoj*, 169 USPQ 226, 229 (CCPA 1971) states:

In the first place, it is elementary that the mere recitation of a newly discovered function or property, inherently possessed by things in the prior art, does not cause a claim drawn to those things to distinguish over the prior art. Additionally, where the Patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

Consequently as applicants have failed to prove that the prior art does not possess the coding characteristic, the arguments are not persuasive.

With respect to Applicant's traversal of the official notice, attention is directed to the art of record, which is replete with teachings of mixers attached to dual component cartridges by way of a bayonet coupling. One such example supporting the assertion is Simmen 5,413,253 (now incorporated into rejection). Clearly a mixer attaching to the cartridge would have to mate with the cartridge and thus have inlets corresponding to the outlets.

Applicant's arguments filed 24 April 2003 are acknowledged. In addition to the repeated previous arguments (addressed above), the added limitation of the cylindrically shaped outlets and closure member plugs are argued. Applicant notes that the outlets of Fig. 1 of Keller '182 are not depicted as cylindrical. However, Keller '182, states with respect to the prior art "the cross-section of the dispensing canals is often not circular and sometimes has a number of corners" (column 1, lines 38-40) and with respect to Keller's invention "It is not unusual for the cross-section to have corners, for example as shown," (column 3, lines 15-18), and "the cross-section of the stoppers 14 and the dispensing canals 4 may be asymmetrical, for example by having a flat surface 14' or 4' on one side" (column 4, lines 25-28). Clearly these statements


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taken in context indicate that Keller teaches that circular cross-section canals are known in the prior art and that the invention of Keller can be practiced with outlets of different cross-sections than that of the exemplary embodiments. Simmen explicitly teaches of the claimed cylindrical outlets and thereby provides evidence that cylindrically shaped outlets are known within the art. It is common knowledge that cylindrical shaped outlets as explicitly taught by Simmen are well known in the dispensing art. Examples such as gasoline nozzles, hose outlets, syringe needles, ketchup and mustard container outlets, and drinking straws readily come to mind. Yet despite the prior art teaching of Keller, and the explicit teaching of Simmen, applicant argues that the cylindrical shaped outlet is a point of novelty and is not obvious. In view of the overwhelming evidence of record, and the common knowledge examples given, applicant's arguments with respect to the cylindrical outlet cross-section are not found persuasive.

### *Conclusion*

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kenneth Bomberg whose telephone number is (703) 308-2179. The examiner can normally be reached on Monday-Thursday from 9:30 AM - 7:00 PM. The examiner can also be reached on alternate Fridays.

The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

  
KENNETH BOMBERG  
PRIMARY EXAMINER  
ART UNIT 3754

K.B.  
May 29, 2003